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IN THE
# Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN AND ANTHONY KERSHAW, INDIVIDUALS; AND LEVIN-ZEMEL, A CALIFORNIA CORPORATION,
*Appellants,*

*v.*

CITY OF BERKELEY, CALIFORNIA, A MUNICIPAL CORPORATION; BERKELEY CITY COUNCIL; AND BERKELEY RENT STABILIZATION BOARD,
*Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

## BRIEF FOR APPELLEES

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## QUESTION PRESENTED

Whether a municipal rent control ordinance, enacted by popular initiative in order to further state housing goals and to alleviate the social and economic ills of a housing crisis, may be treated as a private price-fixing conspiracy and condemned on its face as directly conflicting with the Sherman Act.

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---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

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## BRIEF FOR APPELLEES

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## STATEMENT OF THE CASE

The issue in this case is whether Section 1 of the Sherman Act renders a city powerless to protect its citizens, by means of a democratically imposed government program of rent controls, from "the ill effects of the exploitation of a housing

shortage by the charging of exorbitant rents."[1] The precise question before the Court is whether such a municipal enactment to promote the public welfare may be treated, under Section 1, as if it were a price-fixing conspiracy by a cartel of private economic actors to swell their own profits.

Local rent control — a common urban response to a variety of housing problems[2] — came to the City of Berkeley on June 6, 1972. On that date, a popular initiative enjoying bipartisan support from both tenants and homeowners[3] enacted an amendment to the city charter to "alleviat[e the] hardship caused by rising and exorbitant rents exploiting a housing shortage in the city," *Birkenfeld* v. *City of Berkeley*, 17 Cal.3d 129, 136, 550 P.2d 1001 (1976). The rent control measure was expressly ratified by concurrent resolution of both houses of the California Legislature on August 2, 1972.[4] Rent controls were imposed to rectify a manifest market failure:

> On June 5, 1973, the City Council declared the existence of a housing emergency in the City of Berkeley, based upon the Council's finding of a pattern of steadily rising rents, a shortage of decent housing and an increased deterioration of the existing housing stock in the City.

Tenants Rights Amendments Act of 1982 ("the ordinance"), Part B, Section 2(c). JSA 110.

[1] *Fisher* v. *City of Berkeley*, 37 Cal.3d 644, 693 P.2d 261 (1984), Jurisdictional Statement Appendix ("JSA") 32. All citations to the opinion below will be to the JSA.

[2] Approximately 12% of the 26 million residential rental units in the United States are subject to rent controls. *See* Baar, "Guidelines for Drafting Rent Control Laws: Lessons of a Decade," 35 Rutgers L. Rev. 723, 725-726 n.1 (1983). Fully half of these, or nearly 1.5 million units, are subject to rent controls enacted by cities pursuant to their own, "home rule" police power. *Id.* at 725-26 n.1, 763; *see also* U.S. Bureau of Census, Census of Housing: 1970, Housing Characteristics for States, Cities & Counties. Rent controls are currently in effect in the District of Columbia, in New York City and several other municipalities in New York, and in approximately five cities in Massachusetts, including Boston, fifty cities in California, including Los Angeles, San Francisco and Oakland, and a hundred cities in New Jersey, including Newark and Jersey City. *See* 35 Rutgers L. Rev. at 725-29, 763.

[3] *See Birkenfeld* v. *City of Berkeley*, 17 Cal.3d 129, 146 n.14, 550 P.2d 1001 (1976).

[4] *Id.*, 17 Cal.3d at 137 & n.2.



After the first rent control program was invalidated by the California Supreme Court on due process grounds,[5] an interim rent control law was directly enacted by the Berkeley electorate in 1978 (Measure I). Upon its expiration in 1979, Measure I's provisions were modified and extended until the June 1980 city election, by the City Council's enactment of Ordinance 5212. On June 3, 1980, the Berkeley electorate passed Measure D, the rent control ordinance at issue here.[6] The goals of this rent control program, as stated in the ordinance itself are:

> . . . to protect tenants from unwarranted rent increases and arbitrary, discriminatory or retaliatory evictions, . . . to maintain the diversity of the Berkeley community, . . . to address the City of Berkeley's housing crisis, [to] preserve the public peace, health and safety and [to assure a home in the City for] low and fixed income persons, minorities, students, [the] handicapped, and the aged.

JSA 111. The ordinance states on its face that it was enacted as part of the City's obligation, under state law, to meet the housing needs of its residents.[7]

At no time has the City of Berkeley imposed a "rent freeze" in order to achieve these ends.[8] Nor does the present ordinance "fix" rents: the ordinance imposes only a ceiling on rent *increases*. Landlords thus remain free to compete for tenants by the traditional methods of lowering rents, improving services, and making improvements to their units to make them more attractive. Nor is even the ceiling on rent increases itself absolute. The City's Rent Stabilization Board ("the Board") — comprising nine Commissioners elected by Berkeley's voters —

[5] *See Birkenfeld, supra.*

[6] In 1982, amendments to Measure D were enacted by another initiative of the Berkeley voters. The ordinance was reviewed by the court below as amended, and is now before this Court in that form.

[7] JSA 109, 110.

[8] Contrary to appellants' mischaracterizations, *see* Appellants' Brief at 5, 6, neither Measure I nor Ordinance 5212 "froze" rents. Both measures allowed increases for documented increases in landlords' operating costs. *See* Measure I, § 12; Ordinance 5212, § 7.

reviews the situation annually, after making its own comprehensive surveys of prices and economic conditions and taking testimony at public hearings. *See* JSA 124. The ordinance mandates that the Board adjust rent ceilings upward in order to accommodate increases in utility costs, property taxes, maintenance costs and operating expenses. JSA 123.

In addition to this annual city-wide review, landlords may petition for individual rent increases. JSA 126. Such applications are promptly reviewed at public hearings, JSA 127-28, at which both tenants and landlords have a right to legal counsel and a right of appeal to the Board itself. *Id.* "[A]ll relevant factors" are considered in such applications, JSA 129, and the ordinance specifically provides that nothing therein shall prevent the Board from rectifying "cases of individual hardship" by "provid[ing] the landlord with a fair return on investment." JSA 130, 131. As the court below found, "the effect of inflation on a landlord's investment," JSA 42-43 & n.40, is among the considerations. Newly constructed rental units are exempt from rent control under the ordinance. JSA 114.[9] And should the housing crisis abate, as evidenced by a rental vacancy rate in excess of 5%, the City Council is empowered to decontrol rents. JSA 119.

When appellants challenged these provisions on their face,[10] the California Supreme Court concluded that Berkeley's rent control program was "reasonably related" to "'the alleviation of the ill effects of the exploitation of a housing shortage by the

[9] The ordinance can therefore hardly be the cause of any decline in rental construction that may exist. Contrary to their assertions, *see* Appellants' Brief 29 n.14, even appellants' own "Bay Area Council report," JS App. H — which is not part of the record — concluded that it is "the 'front-end' financing problem" (an issue of high interest rates) that is the primary cause of the rental housing shortage in the San Francisco Bay Area, JSA 141. So "pervasive and overriding" is this independent problem that it "obscure[s] the effects of . . . rent control," *id.*, and rent control becomes an issue only "[w]hen the economics of rental housing are set aside." JSA 147. In any event, this "report" does not purport to address the specifics of either the Berkeley housing crisis or the Berkeley ordinance, but instead deals in general terms with "Rental Housing in California," JSA 140.

[10] The Complaint alleged violations of due process, equal protection, and the right of privacy, an impairment of contracts and a taking without just compensation, all under both the federal and state constitutions, as well as violations of several state laws. *See* Joint Appendix ("JA") 4-5, 9.



charging of exorbitant rents to the detriment of the public health and welfare of the city and particularly its underprivileged groups,'" JSA 32, and held that the ordinance was not confiscatory and did not deny appellants due process, JSA 40, 52.[11]

The argument that federal antitrust law might preempt the ordinance was not advanced by any party to this case, and was in fact raised only in the California Supreme Court by an *amicus curiae* and then only after discretionary hearing in the case had been granted. *See* JSA 75. The complaint filed by appellants and dismissed below thus not only failed to allege preemption by the Sherman Act, but further failed to allege: (1) any facts that would support a finding that the ordinance has a significant effect on interstate commerce;[12] (2) any facts that would support a finding that the ordinance constitutes or is the result of a conspiracy to restrain trade;[13] and (3) any facts that would support a finding that the ordinance has any anticompetitive effect.[14] Appellants raise only a facial challenge to the ordinance, and there is no issue before this Court regarding the validity, under Section 1 of the Sherman Act or otherwise, of any application or invocation of the ordinance. And appellants make no claim before this Court that the rent control ordinance represents any monopolization or attempted monopolization in conflict with section 2 of the Sherman Act.[15]

[11] This Court dismissed appellants' appeal of these due process rulings for lack of a substantial federal question. 105 S.Ct. 2653 (1985). Therefore, even if the City of Berkeley felt as free to roam beyond the record as appellants have, *see, e.g.*, Appellants' Brief at 5 n.7, 7, 7-8 n.9, 25-26, 29 n.14, the wisdom of the means chosen by the Berkeley electorate to deal with the City's housing crisis is not in issue. In any event, on August 22, 1985, after taking testimony and reviewing thousands of pages of exhibits, the United States District Court for the Northern District of California, Judge William H. Orrick, presiding, granted judgment for defendant in *Amberhill Properties* v. *City of Berkeley*, No. C-84-3407(WHO). The District Court upheld the ordinance *as applied* over challenges, raised by a partnership of Berkeley landlords, that it denied them due process and equal protection and that it so deprived them of a reasonable return on their investment as to constitute a taking without just compensation.

[12] *See* the Complaint, JA 2-9.

[13] *See id.*; *Fisher* v. *City of Berkeley*, JSA 32, 35.

[14] *See* JA 2-9.

[15] Nor could they, since the City of Berkeley is neither a significant producer nor a significant purchaser of rental housing. Even if future planned construction

## SUMMARY OF ARGUMENT

An agreement among landowners to restrict the sale, use, or rental of their property might well constitute a combination in restraint of trade and could, if it were to fix prices or rents, constitute conduct illegal *per se* under section 1 of the Sherman Act. Similarly, price maintenance agreements among landowners and those to whom they sell or rent, regarding re-sale or sub-leasing, might well implicate section 1. The present case would raise these same issues if the City of Berkeley had "simply authorized" rent-setting — either horizontally among landlords, or vertically among landlords and their tenants — and then merely "enforce[d] the prices established by [these] private parties." *California Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). That might well entail a *private* combination in restraint of trade that mere governmental approval could not save. But that is not this case.

Here, by contrast, the City of Berkeley, pursuant to the direct vote of a majority of its electorate, has imposed a uniform *public* regulatory regime of its own design, in which maximum rent increases are set and adjusted not by private entities, but rather by a popularly elected municipal agency with its own investigative and enforcement powers. Berkeley's rent control program is no more problematic under the Sherman Act than is any other municipal imposition of general public restrictions that private businesses might regret — for example, New York City's imposition of the development restrictions at issue in *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978); Detroit's imposition of the adult-theater zoning at issue in *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976); or Belle Terre's imposition of the limits on landlords' choice of tenants at issue in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).

is included in the tabulation, the Berkeley Housing Authority's public housing units constitute no more than one third of one per cent of the rental housing stock in the City. No argument has been or credibly could be made that the rent control ordinance is part of some sort of predatory pricing scheme by the City of Berkeley to drive all landlords out of business and thereby to corner the market on rentals within its jurisdiction.



The question here is whether Berkeley's governmental rent regulations may be treated, under section 1 of the Sherman Act,[16] in the same way that a private producer's coercive imposition of price restraints upon its wholesalers and its dealers would be. The court below rightly held that it cannot. The test crafted by the court below — holding the rent control ordinance facially reasonable, for Sherman Act purposes, because sufficiently related to the public welfare — properly respects this Court's caveat that "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."[17] Whether or not this Court endorses that particular test, the judgment below, dismissing appellants' facial Sherman Act attack on Berkeley's rent control ordinance, must be affirmed, for any one of three independent reasons.

*First*, no such facial attack could succeed unless the ordinance either authorizes or embodies a "contract, combination . . . or conspiracy" forbidden by section 1 of the Sherman Act. But the ordinance plainly involves no such conspiracy. Indeed, to find this essential element of section 1 in the ordinance would be to hold the social contract itself to be less a metaphor for our collective obedience to democratic majorities than a literal conspiracy in restraint of trade. *See* section I *infra*.

*Second*, even if the Berkeley ordinance were held somehow to involve a "conspiracy" that could trigger scrutiny under section 1 — or if the absence of such an agreement were deemed no bar to an antitrust attack — that ordinance still could not be held on its face to be the sort of restraint of trade the Sherman Act condemns as unreasonable, whether according to the test advanced by the court below, or under any other test appropriate to an antitrust challenge brought against a municipal government. To hold otherwise would be to forbid

[16] Appellees press no claim that Berkeley's rent control ordinance is an attempted monopolization preempted by section 2 of the Sherman Act. *See* Statement of the Case and n.15 *supra*.

[17] *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 417 n.48 (1978); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 57 n.20 (1982).

cities to engage in a wide range of standard public regulation that in no way violates the terms or purposes of the antitrust laws. *See* section II *infra*.

*Third*, even if both of those grounds were rejected, the judgment below would nonetheless have to be affirmed because the State of California has legislatively required its municipalities to ensure affordable housing for their citizens, empowering them to do so by rent control if they wish, and in any event fully contemplating that fulfillment of this state-imposed requirement might impair the competitive freedom of landlords. *See* section III *infra*.

## ARGUMENT

Appellants' entire argument to this Court rests on a single premise — one that is fundamentally wrong. Appellants assume that a democratic decision by a city to regulate prices is no different from a conspiracy by private economic actors to engage in price-fixing. Because a cartel of landlords banding together privately to set city-wide limits on apartment rents would violate section 1 of the Sherman Act *per se*, appellants argue, the City of Berkeley's decision by majority vote to enact rent control must do so too. According to appellants, it simply does not matter that it is a *city*, and *not* a private cartel, that is regulating rents.[18]

Such a view distorts beyond recognition the role of cities in our system of government. No decision of this Court has ever held or even intimated that legislation by local democracy is the mere equivalent of agreement by private cartel.[19] To the

[18] *See* Appellants' Brief at 25 ("It is beyond dispute that had the owners of the 23,000 rental units in Berkeley combined, on their own, to stabilize collectively the rental prices of their premises, such would violate the Sherman Act. The anticompetitive impact . . . is identical where — as here — the same price stabilization is accomplished by municipal ordinance."). *See also id.* at 13, 21-24.

[19] Cities, for example, are subject to constitutional norms inapplicable to private economic actors. As Justice White wrote for the Court almost two decades ago, "[t]he actions of local government *are* the actions of the State. A



contrary, as the Chief Justice wrote for the Court nearly a decade ago, when a city itself legislates directly through its voters, as did the City of Berkeley in this case, its decisions simply cannot be equated with mere expressions of preference on the part of narrow private interest groups.[20]

These fundamental differences between cities and private economic actors, so crucial in the constitutional context, do not evaporate in the antitrust context. It is true, of course, that this Court has held that cities, like private parties and unlike states, are powerless to *exempt* themselves from the reach of the Sherman Act. *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982).[21] But that decision did *not* reduce cities to the status of private economic actors for purposes of determining Sherman Act *violations*. Although the Court declined to accord cities the power to exempt themselves altogether from the Sherman Act in part out of a fear of local parochialism,[22] this concern hardly implied that a city's constituency is so narrow and insular that cities are to be equated with private corporations beholden only to their shareholders. Rather, as a majority of this Court expressly cautioned in

city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law." *Avery* v. *Midland County*, 390 U.S. 474, 480 (1968). Thus cities are subject to the one person, one vote principle, while private organizations of landowners are not. *Compare Kramer* v. *Union Free School District*, 395 U.S. 621 (1969), *with Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

[20] *See City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 678 (1976) (Burger, C.J.) ("the standardless delegation of power to a limited group of property owners condemned by the Court in *Eubank* and *Roberge* is not to be equated with decisionmaking by the people through the referendum process"). *Compare Eubank* v. *Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928).

[21] Both cities and private parties may be exempted from the Sherman Act by the action of a state. But even in determining entitlement to such a state action exemption, cities and private parties are treated differently. For example, unlike private parties, who can enjoy a "state action" exemption for state-authorized anticompetitive activity only if closely supervised by the state, cities are free to engage in state-authorized anticompetitive activity without any state oversight whatever. *See Town of Hallie* v. *City of Eau Claire*, 105 S.Ct. 1713, 1720 (1985), discussed in n. 77 *infra*.

[22] *See Town of Hallie*, 105 S.Ct. at 1721.

*Boulder*, the vulnerability of cities for antitrust violations will differ from that of private parties, for "certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." *Id.* at 57 n.20 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 417 n.48 (1978)). *See also Boulder*, 455 U.S. at 59 (Stevens, J., concurring) ("the violation issue is separate and distinct from the exemption issue").[23]

Undaunted by this admonition, appellants wholly ignore the fact that Berkeley is a city, not a private cartel. They contend that Berkeley's rent control ordinance is automatically preempted by the Sherman Act because it "mandates the fixing and stabilizing of rental prices,"[24] and private price-fixing conspiracies have long been deemed illegal *per se* under section 1 of the Sherman Act.[25] The argument has a disarmingly simple ring, but it is too simple by half. For city-imposed rent control is *not* price-fixing by private conspiracy. And no decision of this Court (or any other) has ever suggested that public regulation of prices by a *city government* automatically violates or is preempted by anything in the Sherman Act.

Indeed, appellants seek to have the matter both ways: to overcome the absence of any precedent that would dictate automatic *preemption* of a price control ordinance, they would simply equate municipal price control with private price fixing. But to avoid the need to establish any *violation* of the Sherman

[23] Nor should this different treatment of city governments and private interests in the antitrust context seem at all surprising. As this Court reiterated just last Term, a private party engaging in anticompetitive activity is presumed to be "acting to further his own interests, rather than . . . governmental interests." *Town of Hallie*, 105 S. Ct. at 1720. By contrast, the Court will "presume, absent a showing to the contrary, that the municipality acts in the public interest." *Id.* at 1720. *See also* 105 S.Ct. at 1720 n.9 ("Among other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some states are subject to 'sunshine' laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties.").

[24] Appellants' Brief at 21.

[25] *Id.* at 21-24.



Act of a sort they would indisputably have to show if seeking declaratory or injunctive relief against purely private conduct, appellants conveniently ignore their own equation of public controls with private cartels and put forth the thesis that municipal rent control legislation may be "in conflict with federal antitrust law and policy,"[26] whether or not directly violative of a specific provision of the Sherman Act.[27] But no such expansive view of federal preemption doctrine is tenable here.

As appellants would cast it, the sole issue this case poses is whether a municipal ordinance which puts a ceiling on rents "discourage[s] price competition which the federal antitrust laws seek to encourage," and thus offends the Supremacy Clause.[28] But that is not, and has never been, the standard for federal preemption. The force of this Court's repeated admonition that preemption must not be inferred absent genuine *conflict* between national and local law[29] may not be escaped by casual invocation of those decisions of this Court that protected the day-to-day operation of federal agencies or programs from even indirect state or local frustration.[30] For this Court has uniformly refused to translate such rulings into a nebulous doctrine that preempts state or local action whenever its effects may be said to undercut some of the goals, most broadly and abstractly stated, of a congressional enactment.[31]

This Court has only recently reaffirmed this precise view with respect to federal preemption in addressing claims of

[26] Appellants' Brief at 17.

[27] *See* Appellants' Brief at 17-18, 21, 27.

[28] Appellants' Brief at 18.

[29] *See, e.g., De Canas* v. *Bica*, 424 U.S. 351, 357-58 & n.5 (1976); *New York State Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 423 n.29 (1973); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 446 (1966).

[30] *See, e.g.*, Appellants' Brief at 18, 40, citing *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235, 239 (1967).

[31] *See, e.g., Pacific Gas & Electric Co.* v. *State Energy Comm'n*, 461 U.S. 190, 222-23 (1983) (federal goal of promoting nuclear power development); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 663 (1981) (federal goal of promoting commercial coal use); *Exxon Corp.* v. *Gov. of Maryland*, 437 U.S. 117, 131-32 (1978) (federal goal of promoting private competition). *See also Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 491-93 (1974); *Goldstein* v. *California*, 412 U.S. 546, 561-70 (1973).

conflict with the Sherman Act. As the Court reiterated in *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982), there can exist an irreconcilable conflict between a state regulation and the Sherman Act warranting facial invalidation only if the state regulation, in all of its possible applications, gives effect to an actual *violation* of the Act. *Id.* at 661.[32] Regulation that does not effect such an actual violation is not invalid under the Supremacy Clause, for "a state statute is not pre-empted by the federal antitrust laws simply because it might have an anti-competitive effect," *Rice*, 458 U.S. at 659 — even one that some might label "pernicious in thwarting competition."[33] *Accord, Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978), *cited in Boulder*, 455 U.S. at 57 n.20.

This limitation on the preemptive reach of the Sherman Act must apply with equal force to municipal regulation. For no member of this Court has disagreed with the proposition that, "[i]f municipalities are permitted only to enact ordinances that are consistent with the procompetitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed," *Community Communications Co.* v. *City of Boulder*, 455 U.S. at 67 (Rehnquist, J., dissenting) (citing *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. at 133) — a consequence the entire Court has disclaimed any intention of inviting. *See Boulder*, 455 U.S. at 57 n.20 (citing *Exxon*, 437 U.S. at 133).

Appellants offer no reason why this should be the first case ever in which local legislation that neither violates the Sherman Act, nor authorizes any private violation of the Act, should be held preempted under some ethereal penumbra of the Act. Launching any such novel and expansive view of Sherman Act preemption here would put cities in an untenable double bind: while as powerless as private parties to *exempt* themselves

[32] As Justice Rehnquist wrote for the Court in *Rice*, "a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases" — that is, "when the conduct contemplated by the statute is in all cases a *per se* violation." 458 U.S. at 661.

[33] Appellants' Brief at 21.



from the Sherman Act, cities would be denied the privilege private parties enjoy of ordering their economic affairs as they wish so long as they do not actually *violate* the Act.

Accordingly, appellants' loose misreading of preemption principles must be rejected, and, following the principle put forth in *Rice* v. *Norman Williams Co.*, the rent control ordinance enacted by the people of the City of Berkeley can be facially condemned only if it effects or embodies a *violation* of section 1 of the Sherman Act. For the reasons that follow, this ordinance plainly does not.[34]

## I. BECAUSE THE CITY OF BERKELEY'S RENT CONTROL ORDINANCE INVOLVES NO AGREEMENT OR CONSPIRACY TO RESTRAIN TRADE, SECTION 1 OF THE SHERMAN ACT IS WHOLLY INAPPLICABLE.

Section 1 of the Sherman Act is not addressed to unilateral conduct, even that which is anticompetitive. *Copperweld Corp.* v. *Independence Tube Corp.*, 104 S.Ct. 2731, 2740 (1984); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 149 (1968). It applies only when two or more persons or separate entities act together to form a "contract, combination . . . or conspiracy in restraint of trade or commerce." No such conspiracy is conceivably present in the operation of the Berkeley ordinance on its face.

Not surprisingly, appellants are remarkably vague in their brief about what sort of conspiracy they think is present. Indeed, the words "contract," "combination," "conspiracy," and "agreement" never even appear in appellants' descriptions of Berkeley's supposedly illegal conduct.[35] To their credit, appellants nowhere attempt to argue that the conspiracy consisted of rent control proponents' joint efforts to get the rent control

[34] *See* sections I & II *infra*. Even if the ordinance were a violation, it would nonetheless be exempted from the Sherman Act because authorized by the State of California. *See* section III *infra*.

[35] Appellants characterize the Berkeley ordinance simply as a "rent-fixing" or "price-fixing *program*." *See, e.g.*, Appellants' Brief at 13, 18, 22, 24, 25 (emphasis added).

measure placed on the ballot and passed by the electorate. Such an argument would, of course, be hopeless in light of this Court's holding in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 136 (1961), that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint" on competition.[36]

Nor do appellants anywhere suggest that the relevant conspiracy is among the different arms of the city government named as defendants: namely, the City itself as a municipal corporation, the City Council, and the City's Rent Stabilization Board. Such an argument would likewise have been futile, for it is well-settled law that "[c]oncerted action by persons within a single . . . enterprise is not a 'contract, combination . . . or conspiracy' within the meaning of section 1." P. Areeda, *Antitrust Analysis* 395 (3d ed. 1981). Just as divisions or other internal units of a corporation cannot be found to have conspired among themselves in violation of section 1,[37] and just as a parent corporation and its wholly-owned subsidiary "are incapable of conspiring with each other,"[38] so agencies of a single government cannot be found co-conspirators. To hold otherwise would create a self-proving section 1 conspiracy in virtually every government program.[39]

[36] The Court in *Noerr* construed the Sherman Act in light of the First Amendment, observing that "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives," 365 U.S. at 137, and that to hold lobbying to be an antitrust violation would be to "invade [the] freedoms" protected by "the right of petition," *id.* at 138. Such principles must apply *a fortiori* in the context of a direct voter initiative such as Berkeley's enactment of rent control.

[37] *See, e.g., Copperweld Corp.* v. *Independence Tube Corp.*, 104 S.Ct. at 2741-42.

[38] *Id.* at 2745.

[39] Nor is there any basis for treating the Berkeley City Council or the Berkeley Rent Stabilization Board either as outside contractors or "pawns" capable of conspiring with the city, *see, e.g., Albrecht* v. *The Herald Co.*, 390 U.S. 145 (1968) (newspaper publisher held to have conspired with outside subscription-solicitor and paper-deliverer to fix resale prices), or as separately incorporated subsidiaries of the city capable of conspiring between themselves, *see, e.g., Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U.S. 211, 215 (1951) (commonly-owned but separately incorporated subsidiaries capable of section 1 conspiracy with each other). The City of Berkeley as a whole, the Berkeley City Council, and the Berkeley Rent Stabilization Board are simply interconnected organs through which a single polity — the people of the City of Berkeley — governs itself.



Thus there are only three characterizations of the ordinance by which appellants could possibly hope to transform its operation into a "conspiracy": namely, that it enforces a "conspiracy" among landlords; that it embodies a "conspiracy" between landlords and the city; or that it embodies a "conspiracy" between tenants and the city. None of these "conspiracies" is even remotely present in this case.

### A. No "Conspiracy" Among Landlords Is Authorized By The Rent Control Ordinance.

Appellants rely heavily on several cases in which this Court has held that the Sherman Act preempts state laws allowing *private* economic actors to engage in price-fixing among themselves, wholly unsupervised by the state. *See California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). But such cases are wholly irrelevant here.

In each of those cases, this Court held invalid under the Sherman Act a statutory scheme that gave effect to privately initiated restraints of trade. In *Midcal*, the Court held a California statutory scheme to be facially preempted by the Sherman Act because it allowed private wine producers *themselves* to impose vertical price restraints on wine retailers by fixing the resale prices of their wines in fair trade contracts.[40] In *Goldfarb*, the Court invalidated a state scheme allowing attorneys, through their bar association, to set fixed fee schedules of *their own choosing*, subject to no examination or oversight by the state's highest court.[41] And in *Schwegmann Brothers*, the Court ruled

[40] Because these price schedules were subject to no state supervision, they were simply private price-fixing agreements dressed in a "gauzy cloak of state involvement" that could not shield them from illegality *per se*. 445 U.S. at 105-06.

[41] 421 U.S. at 790-91. The Court found that the state bar had "voluntarily joined in what is essentially a private anti-competitive activity." *Id.* at 792.

that the Sherman Act, as amended by the Miller-Tydings Act, precluded a state from empowering private liquor distributors to dictate whatever minimum resale prices *they* wished to all retailers of their products, without any supervision by the state.[42] Each of these decisions simply reflected the principle that a state may not ratify unsupervised private restraints of trade: "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful," *Parker* v. *Brown*, 317 U.S. 341, 351 (1943).

In stark contrast to the laws at issue in those cases, the Berkeley rent control ordinance neither mandates nor authorizes *any* private price-fixing. The ordinance, quite obviously, has not authorized landlords to fix rental price ceilings among themselves. Indeed, the ordinance sets maximum rent increases directly contrary to the desires of the landlords. As appellants themselves point out,[43] the voice of the City's Rent Stabilization Board in determining rents is by no means the passive echo of the landlords' wishes; if it were, appellants would probably never have filed a complaint. Rent control in Berkeley was inaugurated, was implemented, and continues to operate by the unilateral command of municipal authority — not under a "gauzy cloak" of government supervision. This is not even arguably a case in which a government "demands *private* conduct which the Sherman Act forbids," *Schwegmann Bros.*, 341 U.S. at 389 (emphasis added).[44]

[42] 341 U.S. at 386-88. This was nothing more than an attempt "to authorize and immunize private conduct violative of the antitrust laws." *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96, 110 (1978) (describing *Schwegmann Brothers*).

[43] Appellants' Brief at 6-7.

[44] Were this such a case, it would, of course, make no difference whether the government demand emanated from a city acting on its own or from a city acting under explicit state authorization: what a state may not do under the Supremacy Clause it may not empower its cities to do.



### B. No "Conspiracy" Exists Between City Officials And The Landlords Who Are Subject To The Rent Control Ordinance.

Appellants also suggest that the city has entered into a vertical agreement with the landlords whose rents are regulated by the Berkeley ordinance: "The rent fixing program vertically mandates that landowners stabilize the prices at which they rent their property . . ."[45] Appellants' theory seems to be that private parties, by virtue of being compelled to abide by duly enacted municipal laws, have somehow entered into an agreement or conspiracy with the city government.[46] If ever embraced, this notion would transform virtually all municipal laws that incidentally affect competition or impair someone's business into self-proving antitrust conspiracies, for all laws and regulations are in a literal sense "vertical mandates."

Under appellants' theory, even a municipal program requiring private parking garages to charge uniformly high rates, and imposing a uniform ceiling on taxicab fares — both in order to curb personal auto use in a congested city — would automatically constitute a pair of "vertical conspiracies" between the city and two private groups. Under that theory, the city government — even if it acted solely to address the wholly legitimate municipal concern of solving traffic problems[47] — would be deemed to have conspired in violation of the Sherman Act with both the private parking garages and the cab companies, because those parties must all comply with such duly enacted regulation, however bitterly they might resent it and however vigorously they might protest.

Appellants' theory would also transform virtually all general municipal zoning ordinances into "vertical conspiracies" be-

[45] Appellants' Brief at 22.

[46] Indeed, appellants argue that laws passed by a government are "worse" than private conspiracies because the former include "a penal enforcement mechanism." Appellants' Brief at 13. This notion turns the concepts of illegality, on the one hand, and respect for law, on the other, completely on their heads.

[47] A city government motivated by illicit concerns presents an altogether different situation, addressed in section I.D. *infra*. *See, e.g. Campbell* v. *City of Chicago*, 577 F.Supp. 1166 (N.D. Ill. 1983), and other cases discussed in n.55 *infra*.

tween cities and real estate developers or businesses to divide up, and limit to particular uses, territory that otherwise might have been parceled out and developed in accord with market forces. Surely the antitrust laws were not meant to invite wholesale judicial review of local zoning decisions.

Fortunately, appellants' theory is without merit. Berkeley's rent control ordinance bears no resemblance whatever to the sort of vertical price-fixing conspiracies this Court has held illegal under section 1. The City of Berkeley has not entered into any *agreement* with landlords that sets a cap on the rents they may charge: it has unilaterally *compelled* them, by force of law, to so limit their rents. In a normal resale price maintenance scheme, if a manufacturer faces widespread noncompliance by its dealers with its desired prices, there is little it can do *unless* it can coax the dealers into a binding contract, since terminating all the recalcitrant dealers could never serve the manufacturer's interests. The landlords of Berkeley enjoy no such entitlement to disobey and thus no similar opportunity to acquiesce; rather, the City achieves universal compliance by the routine governmental expedient of enforcing criminal sanctions against violators.

In *Copperweld*, this Court concluded that "the very notion of an 'agreement' in Sherman Act terms between a parent [corporation] and a wholly owned subsidiary lacks meaning," because "the parent may assert full control at any moment if the subsidiary fails to act" in accord with the parent's commands. 104 S.Ct. at 2742. Although the City of Berkeley is by no means the "parent" of the landlords, it is equally meaningless here to speak in terms of an "agreement" or a "meeting of minds,"[48] because the landlords are bound to obey the law. Thus, like the subsidiary in *Copperweld*, they simply have no say in the matter beyond, of course, their say as citizens in advocating the law's repeal.[49]

Permitting a vertical antitrust "conspiracy" to be inferred from the mere fact that landlords are bound by law to obey the

[48] *See, e.g., Monsanto Co.* v. *Spray-Rite Service Corp.*, 104 S.Ct. 1464, 1471 (1984); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

[49] See n.57 *infra*.



rent control ordinance would thus constitute a frontal assault on the very operation of democratic government. Indeed, the only "agreement" such obedience to law could be said to reflect is the social contract itself, under which all who are governed agree to abide by the lawful decisions of the majority. Surely, this is not the sort of "contract" the Sherman Act had in mind.[50]

### C. No "Conspiracy" Exists Between City Officials And The Tenants Who Are Protected by the Rent Control Ordinance.

The possibility that the true illegal agreement here is between the city and the tenants who benefit from rent control is nowhere directly suggested in Appellants' Brief. If it is nonetheless considered, it must certainly be rejected.

For to hold that a large and amorphous group of victors in the legislative process could be deemed "co-conspirators" with their government for Sherman Act purposes would trench upon vital First Amendment freedoms of speech, assembly, association and petition — especially in the case of a ballot measure put directly to the city electorate. This Court long ago made clear that the Sherman Act must be read so as to leave maximum breathing space for the legitimate political expression of economic interest groups[51] — a freedom that must extend to consumers as well as producers.[52] The *Noerr/Pennington* doc-

[50] Appellants' effort to characterize the Berkeley ordinance as a vertical price-fixing conspiracy is unavailing for another fundamental reason. The City of Berkeley differs from a manufacturer who fixes resale prices for its goods because the city is not a producer of the rental housing whose prices it regulates. Nor does it have any commercial interest in that housing, or any profit motive to regulate its price. Whereas the very *goal* of resale price maintenance conspiracies is *to restrict competition* among those regulated, Berkeley's rent control program is not directed at competition among landlords in any way; the impact of the program on competition is wholly ancillary to the City's goal of assuring adequate rental housing for its citizens.

[51] *See Eastern Railroad Conference* v. *Noerr Motor Freight*, 365 U.S. at 137-38; *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-71 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 511-12 (1972).

[52] *See, e.g., State of Missouri* v. *National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980); *cf. NAACP* v. *Claiborne Hardware Co.*, 459 U.S. 86 (1982).

trine plainly protects the concerted action by tenants in the legislative campaign that yielded the rent control ordinance. It would be a profound deterrent to the exercise of just such protected expression if a Sherman Act conspiracy between tenants and the city could be found as soon as the tenants' side happened to win.[53]

### D. Berkeley's Rent Control Ordinance Has None Of The Special Features That Might Give Rise To A Finding Of A Section 1 Conspiracy Involving City Government.

Nothing in the preceding argument that the City of Berkeley has engaged in no antitrust conspiracy *here* depends on a ruling that cities or their officials can *never* be found to have entered into agreements that violate section 1. To the contrary, an affirmance in this case on the ground that there is no conspiracy in no way precludes courts from finding cities, or their officials, to have conspired with others in wrongful restraint of trade where in fact they have done so. Although a definition of "conspiracy" broad enough to encompass the very enactment and enforcement of the Berkeley rent-control ordinance would reduce city government itself to a series of self-proving section 1 violations,[54] a narrower definition of antitrust conspiracy in

[53] *Noerr* does provide a "sham" exception if the concerted action is a cover for "what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 144. But tenants do not *compete* with landlords, except in the political arena. Tenants could not be said to avail themselves of rent control in order to wreak *competitive injury* on landlords, *cf. California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) (trucking firm invoked administrative process solely to harass competitor), since they have a distinct and obvious *self*-interest in obtaining relief from escalating rents that threaten to price them out of their homes. In any event, appellants have alleged no such exception, nor any facts that might support one. As the court below observed, appellants "do not contend that the ordinance was implemented through misconduct, conflict of interest, or in order to effect discrimination." JSA 35.

[54] As Professor Areeda has aptly noted,

> Superficially, one might characterize any 'meeting of the minds' as a conspiracy. So broad a definition is both meaningless and inconsistent with the Sherman Act, because it is grossly overinclusive for the purposes of antitrust law. When Supreme Court justices, legislators, city council members, or zoning commissioners come to agreement within their respective organizations, there is a meeting of the minds. However, no one would use the language of conspiracy, with its connotations of impropriety, if not criminality, to describe the situation. Nor would one say that a judge, commissioner, or other official who decides in favor of party A rather than party B conspires with A, even if he adopted all of A's arguments.

P. Areeda, *Antitrust Law* 14 (1982 Supp.).



the municipal government context would amply suffice to prevent the subversion of government to private purposes that violate the Sherman Act.

At a minimum, such a definition should encompass those cases in which a government official is the corrupt tool of private interests. Professor Areeda would limit actionable section 1 conspiracy to instances where a city official takes anti-competitive action favoring a private party from whom he has actually taken a bribe, or with whom he shares a specific personal financial interest. P. Areeda, *Antitrust Law* 14-18 (1982 Supp.). "If the conspiracy notion means anything in this context, it can embrace nothing more than corrupt or bad faith decisions." *Id.* at 14.

Beyond such paradigm cases of corruption, there may also be a basis to infer a "conspiracy" to defeat competition in violation of the Sherman Act when, for example, city government, in awarding public contracts, franchises, or other privileges to private parties, prefers one private competitor over another without any cognizable purpose other than rank illicit favoritism. And indeed, allegations of just such favoritism mark virtually every reported section 1 claim against a municipal government that has survived dismissal or summary judgment in the lower federal courts.[55]

[55] *See, e.g., Affiliated Capital Corp.* v. *City of Houston*, 735 F.2d 1555, 1557-59 (5th Cir. 1984) (en banc) (mayor abdicates decision over cable TV franchise to four firms "not based on the merits of their proposals . . . but on the political power of the men behind them," allows the four to "divide the city among themselves," and then requires them to make room for a fifth firm that is controlled by mayor's personal attorney), *cert. pet. filed*, 53 U.S.L.W. 3509 (U.S. Dec. 14, 1984); *Westborough Mall* v. *City of Cape Girardeau*, 693 F.2d 733, 743-45 (8th Cir. 1982) (shopping mall developers alleged that city manager and others conspired with developers of rival mall a mile away to rezone land to block first mall), *cert. denied*, 461 U.S. 945 (1983); *Kurek* v.

Whether the kind of city-citizen conspiracy actionable under section 1 is defined as any grant of such illicit, anticompetitive, private favors in concert with the private beneficiaries, or more narrowly as outright bribery,[56] no such definition can possibly

*Pleasure Driveway & Park Dist.*, 557 F.2d 580, 593 (7th Cir. 1977) (golf pros alleged that municipal park district terminated their golf shop concessions at city golf courses after conspiring with one concessionaire to accept a "sham" bid for a monopoly concession at those golf courses), *vacated and remanded for reconsideration in light of City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 992, *antitrust judgment reinstated*, 583 F.2d 378 (7th Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979); *Whitworth* v. *Perkins*, 559 F.2d 378, 379-80 (5th Cir. 1977) (prospective liquor retailer alleged that city council, controlled by owner of largest liquor business in town, had enacted zoning ordinance to exclude him from competing), *vacated and remanded for reconsideration in light of City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 992 (1978), *opinion reinstated*, 576 F.2d 696 (5th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Campbell* v. *City of Chicago*, 577 F.Supp. 1166, 1169-71, 1179 (N.D. Ill. 1983) (independent taxi drivers alleged that city officials and cab companies conspired to restrict number of taxi licences as part of settlement of damage action by cab companies against city); *Cincinnati Riverfront Coliseum, Inc.* v. *City of Cincinnati*, 556 F.Supp. 664, 667-68 (S.D. Ohio 1983) (coliseum owner alleged that city — which derived revenue in direct proportion to ball game attendance — and baseball team conspired to deny coliseum permission to schedule events competing with ball games); *Schiessle* v. *Stephens*, 525 F.Supp. 763, 776 (N.D. Ill. 1981) (real estate developer alleged that mayor and other officials conspired to take her land — rather than land owned by mayor — by eminent domain for transfer to rival developer); *Guthrie* v. *Genesee County*, 494 F.Supp. 950, 952-53, 958 (W.D.N.Y. 1980) (air charter company alleged that city and airport operating company, which also ran competing air charter service, conspired to freeze plaintiff out of city's airport); *Pinehurst Airlines, Inc.* v. *Resort Air Serv.*, 476 F.Supp. 543, 556 (M.D.N.C. 1979) (airline alleged that county board of commissioners, private airport advisory committee and rival airline conspired to run plaintiff out of business, and that county board had been captured by advisory committee). *See also Community Communications Co.* v. *City of Boulder*, 485 F.Supp. 1035, 1038 (D. Colo. 1980) (cable TV company alleged that City Council conspired with potential rival company to install rival as monopoly), *aff'd*, 455 U.S. 40 (1982).

[56] Even in the absence of allegations of corruption, cities, or their officials, might also be found to have conspired with others in wrongful restraint of trade where the cities were participating in the market like private enterprises. For example, a city that provided a trash collection service might be deemed to have violated Section 1 if it conspired to fix prices with competing private providers of that service. Similarly, if a city operated a cement plant and sold cement to retailers pursuant to contracts requiring resale price maintenance, it might be held to have violated section 1. No such facts are even arguably present here. *Cf. Town of Hallie* v. *City of Eau Claire*, 105 S.Ct. at 1715 (towns alleged city was using its monopoly power over sewage treatment services to gain monopolies in sewage collection and transportation); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. at 392 n.6 (electric utility alleged that city, which produced and sold electricity, conspired with private electrical cooperative to prevent utility's construction of new generating plant, and attempted to monopolize electricity market through tying availability of water and sewage services to purchase of city electrical power).



embrace the rent control ordinance enacted in this case. For that ordinance involves *no private favor whatever*. As the court below correctly observed, "[t]here are no allegations of conflict of interest or illegal collusion in the enactment or drafting of the ordinance." JSA 32. Nor could there be, for all that the tenant "beneficiaries" did in connection with this ordinance was to support it in a fairly contested direct referendum campaign[57] which they won at the polls. Whatever self-interest they expressed there, far from signaling illegitimate collusion with the city, was at the core of our political system. For, as Justice Brennan observed in another context, "We have never insisted that the franchise be exercised without taint of individual benefit; indeed our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare." *Brown* v. *Hartlage*, 456 U.S. 45, 56 (1982).[58] *Cf. Hawaii Housing Authority* v. *Midkiff*, 104 S.Ct. 2321, 2330-31 (1984); *Ruckelshaus* v. *Monsanto Co.*, 104 S.Ct. 2862, 2879-80 (1984). It may well prove challenging for courts, in other section 1 cases, to draw lines between a city's illegitimate conspiracy with private interests and a city's legitimate "summation of . . . individual pursuits," *Brown*, 456 U.S. at 56. But "acknowledging the difficulty of rendering

[57] There can be no doubt that landlords had a full and fair opportunity to seek to influence the vote in that campaign. *See Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1981) (striking down expenditure limit opposed by the landlords). The expenditure limit ultimately struck down in that case was in effect, if at all, only for a brief period following the California Supreme Court's judgment for the City in August of 1980 — long after the campaign which enacted Measure D concluded in June of 1980.

[58] In *Brown*, this Court unanimously held that a state's nullification of a victorious candidate's election, on the ground that his campaign promise to lower his own salary if elected was a bribe for votes in violation of state law, unconstitutionally intruded upon First Amendment interests in robust political debate. 456 U.S. at 61-62.

a concise formulation, or recognizing the possibility of borderline cases, does not disable us from identifying cases far from any troublesome border," as this one is. *Id.*[59]

However Berkeley's rent control ordinance is regarded, in no event does it even remotely resemble the pictures of anticompetitive conspiracies that this Court has drawn in cases of private price-fixing. Accordingly, the judgment below should be affirmed on the ground that the requisite section 1 conspiracy simply does not exist.

## II. EVEN IF THE ABSENCE OF A CONSPIRACY WERE NO BAR, THIS CHALLENGE WOULD HAVE TO BE DISMISSED, FOR THE ORDINANCE CANNOT BE HELD AN UNREASONABLE RESTRAINT OF TRADE.

### A. The Court Below Correctly Recognized That The Ordinance Cannot Be Condemned Under The Sherman Act Without Considering The Important Public Interests Served.

The Sherman Act condemns only "unreasonable" restraints of trade. *Northwest Wholesale Stationers* v. *Pacific Stationery and Printing Co.*, 105 S.Ct. 2613, 2617 (1985); *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238 (1918). If the inquiry into the reasonableness of regulatory restraints of trade by city governments is to have any meaning whatever, the regulation's relationship to legitimate public ends must be permitted to justify its anticompetitive effects. Yet the court below is attacked by appellants for allowing the city just such justification. The California Supreme Court declined to reach the conspiracy issue, *see* JSA 15 & n.11, ruling instead that Berkeley's rent control ordinance cannot be deemed to conflict with section 1 of the Sherman Act because, in any event, it does

[59] In *Brown*, this Court likewise found that, whatever a close case might be between an illegitimate private bribe and "those candidate assurances that promote the representative foundation of our political system," candidate Brown's pledge to the voters was not such a case. *Id.* at 56.



not unreasonably restrain trade. Because city governments exist not to make profits but rather to promote the public health, safety, and welfare — goals to which increased competition need bear no special relevance — there must be a "public welfare 'defense'" to cities' alleged violation of the antitrust laws. JSA 28. Accordingly, the court reasoned,

> . . . if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies.

JSA 31. Under this standard, it upheld the Berkeley ordinance. JSA 31-33.[60]

If this Court reaches the question of whether Berkeley's rent control ordinance is a reasonable restraint of trade, it must find, as did the court below, that the ordinance's relationship to the city's public welfare justifies any anticompetitive impact it might have. Appellants offer two reasons why such a public welfare defense is supposedly precluded; both are wrong.

Appellants first argue that this Court's decision in *Boulder* precludes any municipal defense to an antitrust challenge other than a demonstration that the city's anticompetitive conduct bears the imprimatur of an express state policy to displace

[60] The state court, following its own precedent, *Birkenfeld* v. *City of Berkeley*, 17 Cal.3d 129 (1976), found the rent control ordinance "reasonably related" to the city's legitimate exercise of its police powers because its stated purpose, and its manifest result, is to alleviate "'the ill effects of the exploitation of a housing shortage by the charging of exorbitant rents to the detriment of the public health and welfare of the city and particularly its underprivileged groups.'" JSA 32. This means-ends relationship was also upheld over a substantive due process challenge to the ordinance *as applied* on August 22, 1985, by Judge Orrick of the United States District Court in San Francisco, in an action brought by a group of Berkeley landlords. *See* n.11 *supra* (Findings of Fact and Conclusions of Law at 14).

competition.[61] The *Boulder* decision in fact did no such thing. *Boulder* did limit cities' enjoyment of the "state action" *exemption* under the doctrine of *Parker* v. *Brown* to those instances in which the city can demonstrate affirmative authorization by the state pursuant to a policy to displace competition with regulation. But *Boulder* did *not* preclude, or purport to preclude, municipal defenses to the alleged underlying antitrust *violation* itself, independent of any "state action" exemption. *See* 455 U.S. at 56-57 n.20; *id.* at 58-60 (Stevens, J., concurring). Put another way, *Boulder* did not relieve antitrust plaintiffs of the burden of proving *both* conspiracy *and* unreasonableness when challenging a city regulation under section 1 of the Sherman Act. Cities remain free to negate both of these elements.

Appellants' second criticism of the public welfare defense is equally lacking in merit. Appellants again confuse the distinct concepts of exemption and violation by suggesting that Congress's failure to *exempt* municipal police power activity when it enacted the Local Government Antitrust Act of 1984 ("LGAA") precludes any court from weighing "public welfare" defenses now.[62] Such an argument, of course, defies the usual axiom that Congress cannot make law by *in*action.[63] But even on its own terms, the argument is baseless here. For the LGAA, which in its final form eliminated antitrust damage liability for official conduct of cities and their officials, embodied Congress' deliberate intent to make "no change in the substantive antitrust law applicable to local governments" in actions for declaratory or injunctive relief. H. Rep. 98-965, 98th Cong., 2d Sess. (1984), at 2. That substantive body of law, of course, was and is shaped almost entirely by the federal courts.[64] As the House Report on the final version of the LGAA noted, "The Committee understands that the substantive law has

[61] Appellants' Brief at 12-13.

[62] *See* Appellants' Brief at 15 & n.10.

[63] *See, e.g., Cleveland* v. *United States*, 329 U.S. 14, 22 (1946) (Rutledge, J., concurring); *Scripps-Howard Radio* v. *FCC*, 316 U.S. 4, 11 (1942); *Helvering* v. *Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.).

[64] *See, e.g.*, R. Bork, *The Antitrust Paradox* 72 (1978).



changed, and will continue to change, based on court interpretations." H. Rep. 98-965, at 3. Among those "interpretations" will necessarily be the *judicial* construction of the scope of the rule of reason as applied to antitrust challenges against cities. Thus Congress, by enacting the LGAA, did nothing whatever to preclude the course taken by the court below.

Thus the accommodation between antitrust policy and the need for effective local government that is embodied in the test crafted by the court below is not precluded by any law of Congress or any ruling of this Court. And such an accomodation is essential unless this Court is prepared to accept the "grave responsibility" of suppressing "experimentation in things social and economic," *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), to a point well beyond anything portended by *Boulder*. For surely the value of states as laboratories engaged in "novel social and economic experiments," *id.*, would be drastically impaired if the states were always required to conduct such experiments on a state-wide basis unless their cities could show that their public enactments furthered the policy of competition as well as the welfare of the public. The ability of a populous and sprawling state such as California, in particular, to promote the health, safety and welfare of its people would be drastically impaired if cities were required to seek affirmative authorization from the legislature every time they needed to impose rent controls or enact a building code or regulate street vendors or restrict door-to-door solicitation after dark — in short, any time the cities had to pass laws with inevitable incidental impact on economic competition that the cities could justify only by reference to public welfare, and not by reference to their compatibility with federal antitrust policy.[65]

For to restrict a city to "business excuses" or "efficiency gains" as adequate justifications for engaging in anticompetitive

[65] The routine and mechanical application of Sherman Act precedents decided in the context of exclusively private price-fixing conspiracies to such municipal regulation would also entail a massive incursion by the federal courts into the day-to-day exercise of the police power — an intrusion by no means suggested by *Boulder*.

regulation is to condemn the city in advance to lose every antitrust challenge ever brought against it. Business corporations and municipal corporations differ fundamentally in their goals: a business exists to make a profit; a city exists to govern a polity and to promote its welfare. Cities do not, as a rule, regulate prices in order to achieve efficiencies in their "business"; they do so in order to protect their citizens or to redistribute burdens and benefits among them in accord with democratic process.

Appellants' argument would cast a pall of suspicion over a host of mundane municipal measures other than rent control.[66] A locally imposed vaccination requirement for public school students,[67] for example, might well lead a city to prefer for public use an expensive but effective vaccine over a cheaper but less effective serum, where each vaccine is produced by several companies. There can be no doubt that, if the pharmaceutical companies had themselves jointly decided to produce and sell only the more expensive vaccine, there would be a violation of section 1 to which pleas on behalf of public health would constitute no defense. *See Nat'l Society of Professional Engineers* v. *United States*, 435 U.S. 679, 693-96 (1978). But if appellants' arguments were accepted, the local

[66] Few, if any, municipal laws could ever be justified by their enhancement of open-market competition, for the simple reason that governments exist for the very purpose of protecting people from unregulated "markets" of every kind. In the course of fulfilling their legitimate role, cities limit the number of licenses for street vendors in order to keep urban sidewalks passable; they set sanitation standards for restaurants to promote public health; they bar children from convenience stores and poolhalls during school hours in order to deter truancy; they require dancehalls to close at reasonable hours in order to preserve nocturnal peace and quiet; and they restrict the location and concentration of bars and "adult" theaters and bookstores in order to forestall creation of urban "combat zones." All of these measures restrain trade in some way. That all would be suspect if imposed by an agreement of private economic actors should not render them equally suspect when enacted in furtherance of a city's duty to promote the welfare of its people.

[67] Such a requirement is certainly within the sphere of local authority, for "the regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 105 S.Ct. 2371, 2378 (1985) (upholding local blood plasma donation regulations over federal preemption challenge).



government requiring exclusive use of the more expensive product would be equally guilty of a section 1 violation.

Surely, this cannot be. Although both actions would eliminate competition between the two products, a decision by the drug companies to sell only the most expensive vaccine would be justifiably suspect as motivated more by profit than by public interest, while in the case of an ordinance enacted by the town, "[w]e may presume, absent a showing to the contrary, that the municipality acts in the public interest." *Town of Hallie*, 105 S.Ct. at 1720. The principle that explains the different results with respect to the city and the private manufacturers — and that underlies both *Town of Hallie* and *Engineers* — is that, when a narrowing of options might be desirable on public welfare grounds, this Court will allow that defense to governments while denying it to private entities precisely because, in matters of public interest, the *government is the appropriate source of action*.[68]

The government is likewise the appropriate body to act when unrestrained market forces threaten the public welfare. As this Court recently observed, Congress, in writing the Sherman Act, "was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices" by those producers who held excessive market power. *Assoc. General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 530 (1983). The Sherman Act was designed as a "'consumer welfare prescription.'" *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979) (*quoting* R. Bork, *The Anti-*

[68] For just this reason, when garment manufacturers sought to combat design piracy by collectively boycotting businesses that traded in unlicensed, copied garments, the defense of a well-intentioned effort to stop the unethical trade practice was rejected. This Court denounced the combination as "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the . . . legislature.'" *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U.S. 457, 465 (1941). The Court was referring in that case to the national legislature, but there is nothing in the opinion to suggest that the Court's point was limited to that context. That public health and welfare regulation, ranging from restaurant sanitation standards to building codes, is within the traditional power of municipalities makes a parallel observation entirely apt in this sort of case.

*trust Paradox* 66 (1978)). In this respect, the goal of the Berkeley rent control program — protecting tenants from free-market price-gouging during a period of critically tight rental housing — complements, rather than conflicts with, the primary purpose of the Sherman Act.

### B. Given The Manifest Relationship Of This Ordinance To Important Public Interests, No Appropriate Rule Of Reason Could Invalidate It.

The ordinance at issue here must be upheld because it would pass muster under *any* rule of reason that takes account of the municipal obligation to promote public welfare — whether the rule fashioned by the court below, or any other that this Court might announce. To begin with, there can be no doubt that Berkeley's rent control ordinance survives the test applied below, since it has a "proper local purpose" and is "rationally" (indeed, substantially) related to a "legitimate" (indeed, important) exercise of the local police power. *See* JSA 31-33. The caveat of the court below that appellants had not shown the City capable of achieving its ends as effectively by means having a "less intrusive impact" on antitrust policies, JSA 31, cannot be read as transforming the state court's test into a vehicle for *strict* judicial scrutiny — judicial scrutiny of a sort that this Court has invoked only for laws that infringe such fundamental rights as the franchise and freedom of speech, or that employ such suspect classifications as race. For no socioeconomic regulation could ever meet such a standard, and such a standard would be entirely inconsistent with the principal language used by the court below — namely, that an ordinance must bear a "rational relationship" to a "legitimate" public purpose, JSA 31.

Indeed, the "less intrusive impact" element of the test applied below must be read in light of the lower court's avowed resort to this Court's Commerce Clause cases as a source of authority. JSA 30-31. In the context of a Commerce Clause challenge to a local health or safety regulation, the search for a less restrictive alternative is actually a test of the availability of a



less *discriminatory* alternative.[69] The test applied below invokes this same anti-discrimination principle by including an express requirement that the challenged ordinance "operate[ ] in an even handed manner." JSA 31. The Commerce Clause requirement that there be no less discriminatory option available to the city is aimed at ferreting out health and safety justifications that, "although rational, [are] merely a pretext for discrimination," *Kassell* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 692 (1981) (Rehnquist, J., joined by the Chief Justice and Stewart, J., dissenting). If the city's proffered purposes "'are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce.'"[70]

The judicial suspicion which animates the less discriminatory alternative requirement parallels the reasoning that underlies this Court's refusal to allow private economic actors to justify trade restraints by reference to public welfare:[71] just as business entities might conceal profit motives behind a mask of public safety, so legislatures may be tempted to hide self-serving economic parochialism behind a similar disguise. With respect to Berkeley's rent control ordinance, however, there can be no analogous suspicion. As the court below noted, appellants "do not contend that the ordinance was implemented . . . in order to effect discrimination," nor do they cite any "evidence tending to show that the ordinance fails to regulate . . . in a reasonably evenhanded manner." JSA 35. Since the

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[69] *See, e.g., Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951).

[70] *Kassel*, 450 U.S. at 670 (Powell, J., joined by White, Blackmun and Stevens, JJ.) (quoting *Raymond Motor Transportation, Inc.* v. *Rice*, 434 U.S. 429, 449 (1978) (Blackmun, J., concurring)); *see id.* at 681 n.1 (Brennan, J., joined by Marshall, J., concurring); *id.* at 692 n.4 (Rehnquist, J., dissenting). As long ago as *Dean Milk* itself, the Court made clear that the less restrictive alternative test is simply a means of smoking out illegitimate protectionism, because if any "ordinance is valid simply because it professes to be a health measure," the Commerce Clause would impose no limitation on state action "save for the rare instance where a state artlessly discloses an avowed purpose to discriminate." 340 U.S. at 354. *See also Sporhase* v. *Nebraska*, 458 U.S. 941, 956 (1982) ("we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other").

[71] *See, e.g. Nat'l Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), discussed in section II.A. *supra*.

City is not a competitor in the Berkeley rental housing market,[72] it cannot plausibly be accused of furthering a self-interested, hidden agenda of stifling competition. Under the suitably deferential standard employed below, the ordinance cannot be found wanting.[73]

Even if this Court were to embrace a tougher, intermediate standard of scrutiny of municipal regulation challenged under the Sherman Act, appellants could not plausibly contend that the ordinance would fail to meet it. For rent control — even if one deems it unwise — surely bears a substantial relationship to the important government interests of halting price-gouging, preserving community diversity, and assuring adequate housing for minorities, the poor, the disabled and the aged. *See* Statement of the Case *supra*; JSA 32, 111.

But the ability of the particular ordinance at issue here to survive heightened scrutiny should not encourage the adoption of any test more exacting than the one used below. For as this Court recently counseled, "[e]ven assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all." *City of Cleburne* v. *Cleburne Living Center*, 105 S.Ct. 3249, 3257 (1985).

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[72] *See* n.15 *supra*.

[73] Under the Sherman Act, as under the Commerce Clause, there is ample reason to defer to government regulation whenever its stated rationale is neither illusory nor a pretext for illicit motives such as discrimination. *Cf. Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 459, 463 n.7, 471 n.15, 473-74 (1981). The mere fact that some economic actors are incidentally burdened more than others is insufficient to invalidate an ordinance. *Id.* at 474; *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 127-28 (1978). Even when reviewing an ordinance under the Privileges and Immunities Clause of Article IV — which requires more demanding scrutiny than does the Commerce Clause — the less discriminatory alternative test for illegitimate purposes, *see, e.g., Supreme Court of New Hampshire* v. *Piper*, 105 S.Ct. 1272, 1279 & nn. 17 & 18 (1985) (suggesting that state refusal to admit non-residents to its bar may have been designed to protect local lawyers from competition); *Toomer* v. *Witsell*, 334 U.S. 385, 398-99 (1948), is applied "'with due regard for the principle that [governments] should have considerable leeway in analyzing local evils and in prescribing appropriate cures.'" *United Bldg. & Constr. Trades Council* v. *City of Camden*, 104 S.Ct. 1020, 1030 (1984) (citation omitted).



### C. Regardless Of The Standard Employed, The Ordinance Cannot Be Invalidated *On Its Face* Until Judicial Experience Warrants The Creation Of A New *Per Se* Rule.

Even if this Court were to adopt for future use a non-deferential standard of reasonableness for particular applications of local laws challenged under the Sherman Act, the question of the law's *facial* validity under such a test — all that is at issue in this case — is utterly premature. As the court below rightly held, the rule of *per se* illegality normally applied to private price-fixing conspiracies cannot be applied to a price control measure imposed by a local government, for no legacy of judicial experience with such claims yet warrants a conclusion that such regulation "necessarily produces negative net anti-competitive effects or that it lacks 'any redeeming virtue.'" JSA 22.

In the *absence* of a finding that the Berkeley rent control ordinance is subject to a rule of *per se* invalidity, the ordinance simply may not be condemned on its face, and the judgment below must therefore be affirmed. For, as this Court stated in *Rice* v. *Norman Williams Co.*, a statute, "when considered in the abstract," may be invalidated under section 1 only "when the conduct contemplated by the statute is in all cases a *per se* violation"; "[i]f the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract." 458 U.S. at 661. This is so because the rule of reason would necessitate a factual record about the *actual operation* of the law *in particular instances* — a factual record that must, of course, be absent in any facial challenge to the law as such: "Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is *facially* inconsistent with federal antitrust laws." *Id.* (emphasis added). The inapplicability of the *per se* rule against private price-fixing to the public ordinance at issue here, and the unavailability of any other *per se* rule of invalidity, are thus grounds in themselves for affirming the judgment below.

The California Supreme Court's conclusion that no *per se* rule is appropriate in this case is unassailable. *Per se* rules in the context of section 1 of the Sherman Act "permit categorical judgments with respect to certain business practices that *have proved to be* predominantly anticompetitive." *Northwest Wholesale Stationers* v. *Pacific Stationery and Printing Co.*, 105 S.Ct. 2613, 2617 (1985) (emphasis added). These rules of automatic illegality are thus merely judicial short-cuts for determining whether anticompetitive agreements effect *unreasonable* restraints of trade — short-cuts that are possible only after the accumulation of a wealth of judicial experience in reviewing a given practice under the rule of reason in individual cases on particular factual records. Conduct as to which such experience is lacking may not be placed into this category on the mere basis of superficial resemblance to conduct already within it.[74]

Appellants' pleas for *per se* invalidation of Berkeley's rent control ordinance, solely on the basis of its superficial resemblance to private actions taken for the purpose of "raising, depressing, fixing, pegging or stabilizing" prices,[75] must therefore be rejected. The judicial formulation of new *per se* rules cannot rest on facile analogies; yet appellants blithely gloss over the fact that this Court's "[un]waver[ing] . . . enforcement of the *per se* rule against price fixing," *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 347 (1982), has occurred exclusively in the context of private industries, not public regulation.[76] To impose a per se rule against municipal

[74] *Northwest Stationers*, 105 S.Ct. at 2620-21 (holding that joint expulsion of member from purchasing cooperative, although describable as a concerted refusal to deal, was not the kind of concerted refusal to deal warranting *per se* invalidation); *see also National Collegiate Athletic Ass'n* v. *Board of Regents*, 104 S.Ct. 2948, 2961-62 (1984).

[75] Appellants' Brief at 18-19 (quoting *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)).

[76] This Court has rejected claims on the part of members of some private industries that special characteristics of their industry entitled their agreements to fix prices to immunity from *per se* invalidation. *See Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 349-51; *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 695-96 (1978). But in so doing, the Court has stressed that this reflects simply the principle that the *per se* rule



price regulation is therefore to impose a *new per se* rule altogether. And because it is "established . . . that a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged," *id.* at 349 n.19 (citing *White Motor Co.* v. *United States*, 372 U.S. 253 (1963)) — experience utterly lacking in the case of municipal rent control — no such *per se* rule could yet be available to invalidate the ordinance at issue here. Accordingly, pursuant to the principle announced in *Rice*, the judgment below must be affirmed.

## III. EVEN IF THIS COURT WERE TO VIEW THE ORDINANCE AS OTHERWISE A SHERMAN ACT VIOLATION, MUNICIPAL RENT CONTROL IN CALIFORNIA IS SO PLAINLY CONTEMPLATED BY STATE LEGISLATION ESTABLISHING LOCAL RESPONSIBILITY FOR HOUSING THAT THE ORDINANCE IS NONETHELESS EXEMPT FROM THE SHERMAN ACT'S REACH.

Although the court below did not reach the issue, there is no dispute in this case as to what California law provides on the subject of municipal rent control. The only question, if the Berkeley ordinance would otherwise offend the Sherman Act, is whether that state law meets the federal test laid down by this Court in *City of Boulder* and *Town of Hallie* for the "state action" exemption of *Parker* v. *Brown*. This Court's precedents do not require a state legislature "to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effect." *Town of Hallie*, 105 S.Ct. at 1718. It is sufficient if "[s]uch conduct is a foreseeable result of empowering" the city with "broad authority to regulate" in a particular

against price-fixing cannot "be rejustified for every [different] *industry*." *Maricopa County*, 457 U.S. at 351 (emphasis added). This principle has no application to price regulation by a city, for running a city is not just another "industry." *See* section II.A. *supra*.

field, *id.*[77] California law meets this standard in two ways: first, by virtue of express state ratification of rent control in Berkeley; and second, by imposing on Berkeley a duty to assure housing for its residents while simultaneously reserving to the City the power of rent control as a means of fulfilling that obligation.

Berkeley's original rent control initiative was enacted by the electorate in the form of an amendment to the City charter. That rent control measure was expressly ratified by concurrent resolution of both houses of the California Legislature on August 2, 1972.[78] Moreover, in its *Birkenfeld* decision in 1976, the California Supreme Court expressly upheld local authority to impose rent control, ruling that the California "Constitution *itself* confers upon all cities and counties [a] power . . . as broad as the police power exercisable by the Legislature itself," 17 Cal.3d at 140 (emphasis added).[79] The court went on to conclude unanimously that the municipal rent control program before it was, in its essential features, clearly within the City's

[77] There is no requirement of active state supervision, because Berkeley is a city. Appellants repeatedly misconstrue footnote 10 of *Town of Hallie*, *see, e.g.*, Appellants' Brief at 13, 33 n.16, 37, by reading it without regard to *Southern Motor Carriers Rate Conference* v. *United States*, 105 S.Ct. 1721 (1985), on which the Court expressly relied in footnote 10. Active state supervision was required in *Southern Motor Carriers* because the state had delegated substantial power to a combination of private competitors to propose and effectively fix prices for common carriers. *See* 105 S.Ct. at 1723-24, 1727. In the case at hand, the City's Rent Stabilization Board sets, surveys, adjusts and enforces rental prices *itself* — it does not delegate to landlords any power to collectively propose rents. *See* section I.A. *supra*. Since the price-setting "actor is a municipality," *Town of Hallie*, 105 S.Ct. at 1720, and not a private combination, "the second prong of the *Midcal* test is inapplicable," *Southern Motor Carriers*, 105 S.Ct. at 1727 n.20.

[78] *Birkenfeld*, 17 Cal.3d at 137 & n.2. At that time, Article XI, Section 3 of the California Constitution required that all city charter amendments be approved by concurrent resolution of both houses. This requirement was repealed by constitutional amendment in 1974. *Id.*

[79] Of course, any municipal exercise of such constitutional power is subject to displacement by the state legislature, which may enact general state law preempting contrary laws by municipalities. *See Birkenfeld*, 17 Cal.3d at 141. But California has plainly chosen, to date, *not* to enact any law preempting rent control. Given this potential state preemptive power, it can make no sense to argue, as does one *amicus*, *see* Brief of the Coalition for Competition at 23, that the decision below somehow threatens the state legislature's sovereign prerogative of banning local rent control should it ever decide to do so.



police power, *id.* at 158-60, as a "debatabl[y] . . . reasonable means of counteracting harms and dangers to the public health and welfare emanating from a housing shortage," *id.* at 161.[80]

The ordinance at issue in this case is the direct descendant of the 1972 rent control measure, and was in fact drafted specifically to correct the procedural defects of that original initiative. *See* JSA 50. In 1980, four years after the state supreme court upheld municipal rent control in *Birkenfeld*, and eight years after the California Legislature specifically ratified Berkeley's initial rent control ordinance, the Legislature provided in Section 65589(b) of the Cal. Govt. Code that nothing in the state's new comprehensive housing legislation should be construed as "a repeal of any authority which may exist of a local government to impose rent controls . . .."[81] In these circumstances, "it is clear that anticompetitive effects logically would result," *Town of Hallie*, 105 S.Ct. at 1718, from the power that the Legislature reserved to Berkeley in the field of rent control. Since the Legislature itself had *ratified*[82] Berkeley's earlier rent control initiative, it is beyond

[80] All of the efforts of appellants and their various *amici* to attack the wisdom of rent control, or to find in various actions of the State of California a policy hostile to municipal adoption of rent control, are rendered entirely immaterial by *Birkenfeld*.

[81] Section 65589(b) also provided that the statute should not be construed as a "grant" of *new* local "authority . . . to impose rent controls." Such a grant is unnecessary to Berkeley's argument here, for it is unnecessary to Berkeley's power to regulate rents — a power that, as the court held in *Birkenfeld*, flows directly from the state constitution. Section 65589(b) confirms that the Legislature was well aware in 1980 that cities already possessed rent control authority, and that it wished to preserve that power for them. Further evidence of the Legislature's affirmative awareness of that pre-existing local power can be found in the few enumerated, state-supervised housing programs that have specifically been *exempted* from local rent control. *See* Cal. Health & Safety Code Sections 1518(b), 50008(b), and 51852.5(a).

[82] Although such ratification by concurrent resolution does not repeal inconsistent general legislation for the purposes of California's *state* preemption doctrine, *see Birkenfeld*, 17 Cal.3d at 141 n.10; *Eastlick* v. *City of Los Angeles*, 29 Cal.2d 661, 665, 177 P.2d 558 (1947), it certainly suffices to cloak the municipal enactment in the aegis of state authority for *federal* preemption analysis, since such ratification has, under California law, "all the essence of a plain legislative enactment," *Taylor* v. *Cole*, 201 Cal. 327, 334, 257 P. 40 (1927); *Birkenfeld*, 17 Cal.3d at 141 n.10.

cavil that the same city's subsequent re-implementation of an essentially identical rent control program was "foreseeable."

Even if the foregoing record did not establish Berkeley's authority to impose rent control, a review of California's comprehensive housing legislation leaves no room for doubt. As this Court noted in *Town of Hallie*, "[t]he only real danger is that [a city] will seek to further purely parochial public interests at the expense of more overriding state goals." 105 S.Ct. at 1721. There is no such threat in the instant case, because Berkeley's goal of assuring a home in the City for "low and fixed income persons, minorities, students, [the] handicapped, and the aged,"[83] tracks perfectly the goals of the state. The California Legislature specifically provided in Cal. Govt. Code Section 65580 that "[l]ocal and state governments have a responsibility to use the powers vested in them . . . to make adequate provision for the housing needs of all economic segments of the community."[84] And Section 65581 in turn leaves it to each locality to "determin[e] what efforts are required by it to contribute to the attainment of [this] state housing goal."[85] The ordinance on its face states its self-conscious purpose as a means of "compliance with [the City's] legal obligations relating to the rental of housing."[86]

Appellants would paint this legislative framework as an expression of mere neutrality by the state legislature on the question whether California cities may adopt rent control measures such as Berkeley's.[87] But this statutory scheme is hardly "neutral": it *mandates* that cities take necessary steps to ensure that all their residents are housed. All it leaves to the discretion

[83] This goal is stated in the ordinance itself. JSA 111.

[84] *See also* Cal. Govt. Code Section 65302(c) (requiring that each city's obligatory development plan include "a housing element"); Section 65583 (mandating that this "housing element . . . *shall* make adequate provision for the existing and projected needs of all economic segments of the community") (emphasis added).

[85] *See also* Cal. Govt. Code Section 65300.7.

[86] Section B. (3) "Purpose," JSA 111. *See also* Section B. (2), JSA 109 (making specific reference to the "Housing Element of the Berkeley Master Plan").

[87] *See* Appellants' Brief at 34-35.



of the cities themselves is the choice of *means* for doing so — on the basis of an express state legislative finding that "each locality is best capable of determining what efforts are required," Cal. Govt. Code Section 65581(c). Any means that is rationally calculated to discharge a municipality's state-imposed obligation to meet the housing needs of all its residents — so long as that means has been preserved for cities by the legislature — is surely "a foreseeable result" of imposing that obligation.[88] And rent control is precisely one such means, as the Supreme Court of California expressly held in *Birkenfeld*.[89]

The fact that California has not commanded the choice of this means is immaterial. A municipality need not show that the state "'compelled' it to act" as it did in order to establish that its conduct was taken pursuant to a "'clearly articulated and affirmatively expressed' state policy to displace competition with regulation." *Town of Hallie*, 105 S.Ct. at 1719, 1720. In this regard appellants,[90] like the plaintiffs in *Town of Hallie*, have misapprehended the standard formulated by this Court in *Boulder*. In *Town of Hallie* the Court rejected the argument that Wisconsin's statutes are "neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition." 105 S.Ct. at 1718. Similarly, the fact that California law leaves a municipality free either to pursue the challenged regulatory policy — or to reject it, but *only* in favor of some other means of achieving the state-man-

[88] *See City of Lafayette*, 435 U.S. at 415 ("an adequate state mandate for anticompetitive activities of cities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'").

[89] It is this *combination* of state-imposed duty and state-created power that prevents California from being accurately characterized as indifferent to whether a city imposes rent control. Although the *power* to impose rent control ultimately derives from the California Constitution, this case is easily distinguished from *Boulder* because the *duty* to use that means in fulfilling state-mandated housing goals, or others to like effect if rent control is rejected, derives from express legislation. In *Boulder*, by contrast, neither the Colorado Home Rule Amendment nor any other state legislation addressed the regulation of cable TV, whether by obligating cities to meet their residents' electronic communications needs or otherwise. *See Town of Hallie*, 105 S.Ct. at 1718-19 (discussing *Boulder*).

[90] *See* Appellants' Brief at 34-35.

dated goal — cannot prevent the municipality from tracing its regulatory action to the state.[91]

In its *Boulder* opinion, this Court rejected the dissenting view that its decision would "impede, if not paralyze local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety and welfare." 455 U.S. at 60 (Rehnquist, J., joined by Burger, C.J., and O'Connor, J., dissenting). Whichever side may have been right in that dispute over the impact of the *Boulder* decision on its own facts, there can be little doubt that extending the Sherman Act's prohibitions to regulations that a city chooses to enact in discharging a duty imposed upon it by the state legislature would represent a gross intrusion of Congress's power into the most basic structures of state-local relations. For it is undisputed that the Sherman Act permits a state to confer upon its municipalities complete exemption from the preemptive effect of federal antitrust law insofar as the state is prepared to tie the hands of local government in the selection of means to a state-mandated end. Can it be that the Sherman Act nonetheless leaves cities subject to federal antitrust restrictions whenever the state chooses instead to specify *ends* while leaving localities free to choose the means? Such a construction would stultify state socioeconomic experimentation by transforming the Sherman Act into a novel restriction indeed upon the way in which a state chooses to distribute power between itself and its local governing bodies.[92] The fact that Congress might, after *Garcia*

[91] *See, e.g., Central Iowa Refuse System* v. *Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 426-27 (8th Cir. 1983) (state statute leaving municipalities "with a range of options concerning how best to provide for sanitary disposal facilities" held to constitute sufficient authorization, and not mere indifference, notwithstanding the statute's silence on the particular means of disposal chosen by the city), *cert. denied*, 105 S.Ct. 1864 (1985).

[92] Appellants are grossly mistaken in their assumption, Appellants' Brief at 41 n.20, that all cities outside California imposing rent control do so pursuant to a specific state rent control statute. The New Jersey statutes appellants cite, *id.*, authorize rent regulation only for substandard units, and do not in fact constitute general rent control enabling legislation. As the New Jersey Supreme Court noted in *Inganamort* v. *Borough of Fort Lee*, 62 N.J. 521, 303 A.2d 298 (1973), that state "has no statute dealing with rent control and hence rent control is not preempted by any such measure." 303 A.2d at 307. The court held that New Jersey cities could enact rent controls pursuant to their home rule



v. *San Antonio Metro. Transit Authority*, 105 S.Ct. 1005 (1985), have the power to achieve this extreme result by a clear statement of intent to do so cannot obscure the radical import of a judicial decision in the mid-1980s attributing to the Congress of 1890 any such far-reaching and intrusive purpose.

## CONCLUSION

Chief Justice Hughes once cautioned that, when applying the antitrust laws, "[r]ealities must dominate the judgment." *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933). The pivotal reality in this case is that a local government's rent control program, democratically enacted to promote public welfare, is not the same thing as a private price-fixing conspiracy. Appellants ignore this fundamental reality and seek to have the matter both ways. On the one hand they would equate cities with private economic actors to condemn public price regulation as the mere equivalent of a private price-fixing conspiracy. On the other, striving to expose cities to a withering preemption doctrine this Court has never endorsed, they would deny cities the freedom private corporations enjoy to conduct their affairs as they choose, so long as they do not actually violate the Sherman Act.

The thoroughness with which appellants' antitrust theory would whipsaw *all* municipal governments obscures a result in this particular context that is no less disturbing. The Sherman

power, 303 A.2d at 301, as part of the state policy of "permit[ting] each municipality to act or not to act or to act in a way it believes will best meet the local need," *id.* at 302. One-and-a-half million homes — half of the rent controlled units in the nation — are in New Jersey and California, *see* n.2 *supra*, and are thus regulated by cities in the absence of what appellants call a "specific state mandate," Appellants' Brief at 41 n.20. If cities in several other states should choose to re-enact rent control, they would likewise do so pursuant to their own broad police powers. *See, e.g., Warren* v. *City of Philadelphia*, 115 A.2d 218, 220-21 (Pa. 1955) (rent control power derived from state Home Rule Act); *Heubeck* v. *City of Baltimore*, 107 A.2d 99, 101, 102 (Md. Ct. of Appeals 1954) (derived from Home Rule Amendment).

Act is, in essence, a governmental effort to protect consumers from the predations of producers possessed of inordinate market power. It would be ironic indeed if this statutory shield against economic exploitation could be wielded as a sword to dismember a local government's effort to protect its citizens — and the city itself — from the ill effects of just such exploitation during a housing crisis. For all of the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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